

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

DOLLAR TREE STORES, INC.,)	
)	Case No.
Plaintiff,)	
)	Civil Action
v.)	
)	
WESTFIELD INSURANCE COMPANY, DENT)	
ENTERPRISES, INC., MARK SMUKALL and)	
DIANE SMUKALL,)	
)	
Defendants.)	

NOTICE OF REMOVAL

TO: THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK

PLEASE TAKE NOTICE that defendant Westfield Insurance Company (“Westfield”) and defendant Dent Enterprises, Inc. (“Dentco”) hereby remove the above captioned action from the Supreme Court of the State of New York, County of Erie, to the United States District Court for the Western District Of New York, pursuant to 28 U.S.C. § 1332 and § 1441, *et. seq.*, and assert as follows:

1. An action has been commenced and is now pending in the Supreme Court of the State of New York, County of Erie, entitled *Dollar Tree Stores, Inc. v. Westfield Insurance Company, Dent Enterprises, Inc., Mark Smukall and Diane Smukall*, bearing index number 810419/2014 (hereinafter “State Action”).

2. Westfield first received notice of the State Action on September 25, 2014. Dentco first received notice of the State Action on October 6, 2014. For purposes of 28 U.S.C. § 1446(b),

thirty days since first notice to Westfield and Dentco have not yet expired. No further proceedings have occurred in the State Action.

3. The summons and complaint for the State Action are attached within **Exhibit 1**.

4. This Court has original jurisdiction over the State Action under 28 U.S.C. § 1332. The State Action is one that may be removed to this Court by Westfield and Dentco pursuant to § 1441 in that it is a civil action wherein the amount in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs, and is between citizens of different states.

A. Diversity Of Parties

5. Plaintiff Dollar Tree Stores, Inc. (“Dollar Tree”) is, and was at the time of the institution of the State Action, and now at the time of removal, a corporation incorporated in the state of **Virginia**. (*See* Complaint, at ¶ 2, **Exhibit 1**)

6. Westfield is, and was at the time of the institution of the State Action, and now at the time of removal, a corporation incorporated in the state of **Ohio**. (*See id.*, at ¶ 3)

7. Dentco is, and was at the time of the institution of the State Action, and now at the time of removal, a corporation incorporated in the state of **Michigan**. (*See id.*, at ¶ 4)

8. Defendants Mark Smukall and Diane Smukall are nominal parties that are not relevant in determining removal jurisdiction even though they are both citizens of New York. No relief is sought against either of these defendants. (*See id.*, at ¶ 6) Neither of these parties is real and substantial for purposes of removal jurisdiction. *See Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 218 (2d Cir. 2013) (holding that courts ““must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.””); *St. Paul Fire And Marine Ins., Co. v. Universal Builders Supply*, 409 F.3d 73, 80 (2d Cir. 2005).

B. Amount In Controversy

9. The amount in controversy is not readily discernible from the face of the complaint. However, the amount in controversy is asserted herein under 28 U.S.C. § 1446(c)(2) based upon the following allegations and facts from the complaint and the circumstances that gave rise to it. Dollar Tree seeks in the State Action a declaratory judgment declaring that Westfield, pursuant to an insurance policy, is obligated to assume Dollar Tree's defense, pay Dollar Tree's past defense costs, and provide indemnification to Dollar Tree, with regard to a separate, underlying personal injury action in which Dollar Tree is a defendant (hereinafter, "Smukall Action"). Dollar Tree also seeks damages against Dentco allegedly resulting from breach of insurance procurement and indemnification provisions of an agreement between Dollar Tree and Dentco. (Complaint, at ¶ 1, **Exhibit 1**) With regard to Dentco, Dollar Tree alleges that Dentco should have procured insurance coverage with limits of at least \$1,000,000 per occurrence, and \$2,000,000 aggregate. (*Id.*, at ¶ 26)

10. Dollar Tree alleges it is a named additional insured under a policy that Westfield issued to Dentco. (*Id.*, at ¶¶ 18-19) Dollar Tree also claims that Dentco must indemnify Dollar Tree for any liability Dollar Tree incurs in the Smukall Action, plus pay the defense and litigation expenses Dollar Tree incurs in the Smukall Action.

11. The amount in controversy, therefore, consists of the value of the injuries alleged by the plaintiffs in the Smukall Action in addition to the litigation expenses (which includes attorney's fees) incurred by Dollar Tree in defending the Smukall Action. The Smukall Action is a personal injury action with numerous defendants in which judgment is sought against "defendants jointly and/or severally on each cause of action." (*Id.*, at Exhibit C (*ad damnum* clause), **Exhibit 1**) Consistent with New York practice and New York CPLR 3017(c), the

complaint in the Smukall Action does not make a demand for a specific sum. Nevertheless, bills of particulars from the Smukall Action are pleadings and/or other papers that reflect that the amount in controversy exceeds \$75,000. According to a bill of particulars in the Smukall Action, plaintiff Mark Smukall as a result of the subject accident alleges to have sustained at least the following injuries/damages:

- a) Need to undergo complex spinal surgery, which included permanent immobilization of two full segments of lumbar spine.
- b) Post-operative dehiscence (rupture) of lumbar surgical wound and infection.
- c) Hospital admission for surgery related to infection at lumbar surgical site.
- d) Need to undergo complex arthroscopic surgery of his left knee.
- e) Need to undergo complex left shoulder surgery.
- f) Need to undergo otolaryngologic surgery.
- g) Lumbar disc displacement and degeneration.
- h) Spinal disc herniation.
- i) Left knee internal derangements.
- j) Exacerbation of chronic pyrosis.
- k) Left hip nerve root impingement syndrome.
- l) Lumbar radiculopathy.
- m) Inability to attend to usual daily activities.
- n) Loss of driving licenses.
- o) Sexual dysfunction.
- p) Ongoing pain, suffering and loss of enjoyment of life.

(Pl. Verified Bill of Particulars To Dollar Tree Stores, Inc., at item 8, **Exhibit 2**) Additionally, the plaintiffs allege in the Smukall Action that Mark Smukall has been totally disabled since the subject October 28, 2010, accident. (*Id.* at item 10) Diane Smukall, as Mark Smukall's wife, seeks as a plaintiff in the Smukall Action recovery for loss of society and companionship. (*Id.* at item 22) When one considers the serious nature of the injuries alleged in the Smukall Action, in addition to the litigation expenses sought by Dollar Tree in the State Action, it can be confidently asserted that the amount in controversy in the State Action exceeds the \$75,000 monetary threshold of 28 U.S.C. § 1332.

12. By reason of the foregoing, the State Action may be removed to this Court pursuant to 28 U.S.C. § 1441.

13. Written notice of the filing of this notice of removal and a true and complete copy of this notice of removal are being served on Dollar Tree's counsel as required by law.

14. A true and complete copy of this notice of removal is being filed with the Clerk of the Supreme Court Of The State Of New York, County of Erie, as required by law.

WHEREFORE, Westfield and Dentco pray that the State Action be removed from the Supreme Court Of The State Of New York, County of Erie, to the United States District Court for the Western District Of New York, and that the this Court issue such orders and process as are necessary to preserve its jurisdiction over this matter.

Date: October 24, 2014

Respectfully submitted,

s/ Rafael Vergara

Rafael Vergara, Esq.

White and Williams LLP

250 W. 34th Street, Suite 4110

New York, New York 10119

Phone: 212-244-9500

E-mail: vergara@whiteandwilliams.com

*Attorneys for defendants Westfield Insurance
Company and Dent Enterprises, Inc.*

A copy of notice of removal will be sent to:

Clerk
Erie County Court Building
25 Delaware Avenue
Ground floor
Buffalo, NY 14202

Diane C. Bresee, Esq.
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Attorneys for Plaintiff

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**Fed. R. Civ. P. 7.1 Statement Regarding Westfield Insurance
Company**

Pursuant to Fed. R. Civ. P. 7.1, defendant Westfield Insurance Company states that it is not a parent, subsidiary or other affiliate of a publicly owned corporation, and no publicly held corporation owns ten percent or more of its stock.

Date: October 24, 2014

Respectfully submitted,
s/ Rafael Vergara
Rafael Vergara, Esq.
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Company and Dent Enterprises, Inc.*

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Fed. R. Civ. P. 7.1 Statement Regarding Dent Enterprises, Inc.

Pursuant to Fed. R. Civ. P. 7.1, defendant Dent Enterprises, Inc. states that it is not a parent, subsidiary or other affiliate of a publicly owned corporation, and no publicly held corporation owns ten percent or more of its stock.

Date: October 24, 2014

Respectfully submitted,

s/ Rafael Vergara

Rafael Vergara, Esq.

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New York, New York 10119

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*Attorneys for defendants Westfield Insurance
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Index Identifying State Court Action Documents

Pursuant to L.R. Civ. P. 81, this index identifies the documents filed and/or served in the state court action:

<u>Index</u>	
Exhibit 1	Notice of Commencement Of Action Subject To Mandatory Electronic Filing, dated September 23, 2014; Summons dated August 7, 2014; Verified Complaint (with exhibits A through D) dated September 4, 2014.

Date: October 24, 2014

Respectfully submitted,

s/ Rafael Vergara

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*Attorneys for defendants Westfield Insurance
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To: Diane C. Bresee, Esq.
O'Connor, O'Connor, Bresee & First, P.C.
20 Corporate Woods Boulevard
Albany, NY 12211
Phone: 518-465-0400
E-mail: bresee@oobf.com
Attorneys for Plaintiff

PLEASE TAKE NOTICE that Defendant, Westfield Insurance Company, has filed a Notice of Removal in the United States District Court for the Western District Of New York. The Notice of Removal was filed to remove an action pending in the Supreme Court of the State of New York, County of Erie, entitled *Dollar Tree Stores, Inc. v. Westfield Insurance Company, Dent Enterprises, Inc., Mark Smukall and Diane Smukall*, bearing index number 810419/2014. A copy of the Notice of Removal is attached to this notice.

Respectfully submitted,
s/ Rafael Vergara
Rafael Vergara, Esq.
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*Attorneys for defendants Westfield Insurance
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CERTIFICATE OF SERVICE

1. I, Rafael Vergara, am a partner at White and Williams LLP, attorneys for defendants Westfield Insurance Company and Dent Enterprises, Inc.
2. I make this declaration based upon my personal knowledge of the facts set forth herein.
3. On **October 24, 2014**, I caused (1) Notice Of Removal (with its exhibits); (2) Notice To Plaintiff; (3) Civil Cover Sheet; (4) Fed. R. Civ. P. 7.1 Statement Regarding Westfield Insurance Company; (5) Fed. R. Civ. P. 7.1 Statement Regarding Dent Enterprises, Inc.; and (6) Index Identifying State Court Action Documents to be sent by **mailing and e-mailing** to the following person based upon the following contact information:

Diane C. Bresee, Esq.
O'Connor, O'Connor, Bresee & First, P.C.
20 Corporate Woods Boulevard
Albany, NY 12211
Phone: 518-465-0400
E-mail: bresee@oobf.com
Attorneys for Plaintiff

4. I declare under penalty of perjury that the foregoing is true and correct.

Date: October 24, 2014

Respectfully submitted,
s/ Rafael Vergara
Rafael Vergara, Esq.
White and Williams LLP
250 W. 34th Street, Suite 4110
New York, New York 10119
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*Attorneys for defendants Westfield Insurance
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